No. 12235

In The United States Court of Appeals
For the Ninth Circuit

ELMER SCHNEIDMILLER, *Appellant,*

vs.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a Corporation, Bankrupt, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

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JURISDICTION

District Court—

This was a plenary action by a trustee in bankruptcy to recover on behalf of creditors of the bankrupt estate, a payment to a former creditor, which was preferential and voidable under the laws of the State of Washington (Rem. Rev. Stat. §5831-4 and §5831-6, Appendix p. 1) (Complaint, Tr. 2-5). The district court had jurisdiction by virtue of §70(e)(3) of the Bankruptcy Act (11 U.S.C.A. §110(e)).

Circuit Court—

Final decision and judgment of the District Court of the United States for the Eastern District of Washington, Northern Division, was entered as prayed for in the complaint on March 25th, 1949 (Tr. 27-28) and this court has jurisdiction of this appeal from said final decision of the District Court by virtue of Title 28, U. S. Code, §1291 (28 U.S.C.A. §1291).

STATUTES INVOLVED

Appellee brought his action pursuant to Rem. Rev. Stat. of the State of Washington, §5831-4 and §5831-6 (Laws of 1941, Chap. 103, §1 and §3) (Appendix p. 1).

Appellant relies on Rem. Rev. Stat. of the State of Washington, §5831-5 (Laws of 1941, Chap. 103, §2) (Appendix p. 2).

The court below held that Rem. Rev. Stat. §5831-5 is in any event superseded as to this action by §11e of the Bankruptcy Act (11U.S.C.A. §29(e) (Quoted at p. 41 of this brief).

The statute in effect immediately prior to said Rem. Rev. Stat. §§5831-4, 5 and 6 (Laws of 1931, Chap. 47, §1 and §2a and b) and the statute in effect immediately prior to said §11e of the Bankruptcy Act (§11d of the Bankruptcy Act of 1898, 30 Stat. 544, 549) will be referred to in this brief and are also set forth in the Appendix at pp. 2-3

OPINION BELOW

The District Court overruled and denied appellant's motion to dismiss by written opinion, *Engstrom v. DeVos*, 81 F. Supp. 854, which opinion was made applicable to this action (See 81 F. Supp. 860). Following the denial of said motion appellant by answer admitted all of the allegations of the complaint (Tr. 21) and judgment was entered as prayed for in the complaint (Tr. 27-28).

The contentions of appellant have been separately presented to and considered by three District judges

all of whom have had previous experience with respect to certain of the fundamental points here involved. Judge Sam M. Driver of the United States District Court for the Eastern District of Washington in sixteen cases sustained appellee's complaint on motions to dismiss (See Tr. 7-19, 81 F. Supp. 854). Upon a wholly separate consideration and prior to the publication of Judge Driver's opinion, Judge Lloyd L. Black of the United States District Court for the Western District of Washington, Northern Division, also overruled motions to dismiss in seven cases brought by the appellee herein upon complaints identical with the one here involved (Western District of Wash., Northern Division, Cause Nos. 2009, 2011, 2012, 2013, 2014, 2018, 2023). Judge James Alger Fee, acting upon identical allegations, sustained appellee's action in *Engstrom v. Atkins*, District Court of Oregon, Cause No. 4114, and entered judgment therein as prayed for in the complaint in May, 1949.

In all of these cases the points here involved were presented on brief and by extensive argument by many counsel, but the judges have been unanimous in sustaining appellee's cause of action.

As stated above, these judges have all had previous experience with respect to certain of the fundamental points here involved. Judges Black and Driver were previously judges of the State Courts of Washintgon and before that practiced for many years as lawyers in that state. In these capacities they, of course, were very familiar with the frequently invoked court made rule which has been applied in many Washington cases since *Thompson v. Huron Lumber*

Co., 4 Wash. 600, 30 Pac. 741, that payments made by insolvent corporations must be returned upon demand by a liquidating officer.

This rule was frequently invoked by Trustees in Bankruptcy to recover preferential payments and illustrative cases are *Williams, as Trustee v. Davidson*, 104 Wash. 315, 176 Pac. 334 and *Woods, as Trustee v. Metropolitan National Bank*, 126 Wash. 346, 218 Pac. 266. In the latter case the court stated:

> "The principle on which the receiver based his action would seem to be well founded in law. Ever since the case of *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, this court has adhered to the doctrine that an insolvent corporation may not prefer its creditors; that, although an individual creditor may do so, even to the exhaustion of his property, the right does not exist in a corporation; that its property on insolvency becomes a trust fund for the benefit of all of its creditors to be equally and ratably distributed among them. *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. 810; *Benner v. Scandinavian American Bank*, 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914-D 702; *Jones v. Hoquiam Lumber & Shingle Co.*, 98 Wash. 172, 167 Pac. 117; *Simpson v. Western Hardware & Metal Co.*, 97 Wash. 626, 167 Pac. 113; *Williams v. Davidson*, 104 Wash. 315, 176 Pac. 334.
>
> "The foregoing citations announce the further rule, also, that, in an action or suit on the part of the receiver to recover as for an unlawful preference, it is not necessary that he show that the creditor, at the time of receiving the preference, had knowledge or reasonable cause to believe that the corporation was insolvent. See particularly,

Jones v. Hoquiam Lumber & Shingle Co., supra; Williams v. Davidson, supra.

"Nor were the rights of the parties changed in respect to the right to recover the payments as an unlawful preference by the transfer of the proceedings into the bankruptcy court. By §70e of the bankruptcy act, it is provided that the Trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and may recover the property so transferred from the person to whom it was transferred. That this section gives the trustee in bankruptcy a right of action to recover property transferred in violation of state law, and is not subject to the four months' limitation of other sections (60b, 67e) of the Bankruptcy Act, was held by the Supreme Court of the United States in *Stellwagen v. Clum*, 245 U.S. 605."

As stated in *Meier v. Commercial Tire Co.*, 179 Wash. 449 at 451, 38 P.(2d) 383 at 384, this court made rule has now been written into statute law.

The third District judge to whom these Chemurgy cases have been presented, Judge James Alger Fee of the Oregon District Court, wrote the opinion in *McBride v. Farrington*, 60 F. Supp. 92, which demonstrates that he had previously given great study to §11e of the Bankruptcy Act and the legislative and case history leading up to the enactment of section 11e.

STATEMENT OF THE CASE

Prior to answering, appellant had moved to dismiss appellee's complaint on the sole ground that it failed to state a claim upon which relief may be granted.

As stated above, this motion was denied (Opinion of the Court, Tr. 7-19 Order, Tr. 20). By his answer appellant then admitted all of the allegations of appellee's complaint. Only issues of law are therefore presented and these are restricted by Rule of Civil Procedure 46 to the two objections made at the time findings and conclusions of law were entered, which were as follows (Tr. 26):

> "1. The filing of a petition for an arrangement under Chapter XI of the Act of Congress relating to Bankruptcy was not the filing of a petition for the appointment of a receiver within the meaning of Remington Revised Statutes of the State of Washington, §5831-4, and therefore the payment referred to in Paragraph 8 of the Findings of Fact herein was not made within the four (4) months period designated by Rem. Rev. Stat. §5831-6 and/or
>
> "2. This action was not commenced within the six months' period designated in Rem. Rev. Stat. §5831-5."

On December 13, 1947, Northwest Chemurgy Cooperative, a Washington corporation, which will be referred to herein as "Chemurgy" was adjudicated a bankrupt by the United States District Court for the Western District of Washington, Northern Division. Within six months of said adjudication numerous complaints in identical form were filed by the Trustee in several district courts against those individuals and corporations who had failed to comply with appellee's demand that they return payments made to them by Chemurgy which they were required to return by the terms of Rem. Rev. Stat. of the State of Wash., §5831-4 and §5831-6.

The complaint herein being admitted, the undisputed facts as found by the court are as follows:

On May 29, 1947, Chemurgy filed a Petition for an Arrangement under Chap. XI of the Bankruptcy Act, in the United States District Court for the Western District of Washington, Northern Division. On said date said court entered an order accepting and approving the Petition as properly filed under said chapter. Chemurgy was unable to consummate the proposed arrangement and upon a hearing duly noticed and held pursuant to §376(2) of the Act of Congress relating to bankruptcy (11 U.S.C.A. §776(2)), said court on December 13, 1947, duly made and entered its order that Chemurgy was a bankrupt under said Act and that bankruptcy be proceeded with pursuant to the provisions of said Act. On January 6th, 1948, appellee Engstrom was duly appointed by said court as Trustee of the Estate of said bankrupt and on said date qualified and ever since said date at all times has been the duly appointed, qualified and acting Trustee of the estate of said bankrupt. Said Secs. 5831-4 and 5831-6 of Rem. Rev. Stat. of the State of Wash. (Laws of 1941, Chap. 103, Sec. 1 and 3) were in full force and effect at all times material to the action.

For at least four months immediately prior to May 29, 1947, the date on which said petition was filed, Chemurgy was unable to pay its debts in the ordinary course of business and was insolvent within the meaning of said statutes of the State of Washington. Within said four months' period Chemurgy being then in-

solvent, paid to appellant a total of $4,766.03 upon an antecedent debt then past due and owing by Chemurgy to said appellant upon which appellant was entitled to no offset. The effect of such payment was to enable appellant to obtain a greater percentage of the indebtedness due to appellant than other creditors of the same class.

In his Statement of the Case appellant erroneously states (Appellant's Brief p. 2):

> "As expressly avowed in the complaint, the action is based upon a Washington statute (Sec. 5831-4-6, Rem. Rev. Stat.) (Tr. 3) * * *."

Appellee expressly relied on Rem. Rev. Stat., Sec. 5831-4 and Sec. 5831-6, and quoted these sections in his complaint (Tr. 3-4). He did not and does not rely on Sec. 5831-5 as stated in the foregoing quotation from appellant's brief. This section (Rem. Rev. Stat. §5831-5) is not the section which granted appellee the power to sue. This unequivocal power is granted by the plain words of Rem. Rev. Stat. §5831-6, reading as follows:

> "§5831-6.—Any preference made or suffered within four (4) months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four (4) months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded."

Section 5831-5 invoked herein solely by appellant is, as hereinafter pointed out, obviously a limitation only in the specific instances set out in the section and the limitation is therefore applicable in any event only when the following two necessary conditions precedent are present:

(1) There is no other limitation prescribed by any law on the bringing of an action under Rem. Rev. Stat. §5831-6; and

(2) The action is one which has been brought in the State Courts of Washington.

SUMMARY OF ARGUMENT

1. The filing of a petition under Chap. XI of the Bankruptcy Act, was an application for a receiver (defined by Rem. Rev. Stat. §5831-4 to include a Trustee) within the meaning of Rem. Rev. Stat. §§5831-4 and 5831-6.

2. Appellee was appointed pursuant to said application within the meaning of Rem. Rev. Stat. §5831-4.

3. Rem. Rev. Stat. §5831-5 is not applicable to this action.

(a) By reason of clause—"If not otherwise limited by law,"

(b) By reason of clause—"actions in the courts of this state,"

(c) By reason of §11(e) of the Bankruptcy Act (11 U.S.C.A. §29(e)).

ARGUMENT

I.

Petition Under Chapter XI Was An Application for the Appointment of a Receiver Within the Meaning of Rem. Rev. Stat. §5831-4.

The lack of any merit in appellant's contention that the petition for an arrangement under Chap. XI was not an application for a receiver within the meaning of Rem. Rev. Stat. §5831-4 is indicated in part by the fact that neither of the counsel for appellant herein, either in their oral arguments or written briefs filed with the District Court ever made such a contention or referred to this point in any way. It seems obvious that is has been included as a point of objection only out of deference to one of the counsel whose case is controlled by this appeal (Tr. 29-33) who referred to this point in his memorandum filed with the District Court.

The District Court succinctly and properly held that the filing of this petition was the only petition or application ever filed pursuant to which the appointment of the Trustee was made and when the proposed plan of arrangement failed of accomplishment, adjudication and subsequent bankruptcy proceedings, including the appointment of a Trustee, followed as a matter of law. On this point the District Court stated (Opinion Tr. 10):

> "The crucial event on which the reckoning of time is based as to both limitations is the filing of the application for the appointment of the trustee. The first inquiry in the present case, then, logically, should be whether the filing of

the petition for an arrangement was equivalent to an application for the appointment of the trustee within the meaning of the Washington Act. Section 376, Chapter XI, of the Bankruptcy Act (11 U.S.C.A., Sec. 776) provides that when an original petition for arrangement is filed and and the arrangement is not consummated, the court may, without any further pleading, adjudicate the debtor a bankrupt and carry on the bankruptcy proceedings in the usual way. The petition for arrangement, from its inception, serves the purpose of an alternative petition for adjudication. When the arrangement fails of accomplishment, adjudication and subsequent bankruptcy proceedings, including the appointment of a trustee, follow as a matter of course. The petition for arrangement is the only petition, or application, ever filed, pursuant to which the appointment of the trustee is made. In legal effect, it is the same thing as the application for the appointment of the trustee."

In his argument on this point (Appellant's br. 5) appellant states that the point "calls for a concise analysis of the "Arrangement" provisions of the Bankruptcy Act found in 11 U.S.C.A., §701 *et seq.*, contained in the Chandler Act enacted by Congress in 1938." That such analysis is necessary may be conceded, but appellant fails to do so concisely and overlooks many of the relevant sections of Chapter XI of the Bankruptcy Act. The relevant sections will be hereinafter referred to.

As stated by the District Court there is only one petition which brought about the appointment of the appellee and this was the petition filed on May 29,

1947. As contemplated by Chapter XI there are only two relevant pleadings in the bankruptcy file, said petition and the order of adjudication of bankruptcy and they are both referred to in the complaint. These pleadings show most graphically that what was contemplated by the state statute (Rem. Rev. Stat. §§ 3831-4 and 6) is exactly what took place with respect to this bankduptcy so far as application for and appointment of a liquidating officer is concerned. The state statute contemplates insolvency proceedings in many forms; it refers to "any receiver, trustee, common law assignee or other liquidating officer of an insolvent corporation" (Rem. Rev. Stat. §5831-4).

There was no other petition filed which invoked the jurisdiction of the court to appoint a trustee except the petition referred to in the complaint herein. Said petition is in all respects exactly like, with some additional elements, any other petition for bankruptcy. It includes schedules of assets and liabilities, it lists the creditors, it lists the executory contracts and other necessary data in all respects as required by the ordinary petition in bankruptcy proceedings. The petition brings the corporation under the arm of the court because it is insolvent. The corporation filing must be one which could become a bankrupt under Sec. 4 of the Bankruptcy Act. Notice goes out to all of the creditors immediately and everyone is immediately put on notice that the corporation is insolvent and cannot be dealt with in the ordinary way, and by filing the petition the corporation does invoke the jurisdiction of the court to appoint a trustee if the proposed plan which is included in the petition is

not accomplished. Such a petition of course alleges insolvency and invokes all of the provisions of Chapter XI of the Bankruptcy Act, as was done specifically in this case in which the petition concluded with the words:

> "Wherefore, this petitioner prays that proceedings may be had on this petition in accordance with the provisions of Chapter XI relating to Bankruptcy."

An examination of Chapter XI of the Bankruptcy Act, section by section, will show that it corresponds exactly in all respects to the initiation of an ordinary bankruptcy proceeding with this added element, that the corporation has a period in which to attempt to work out a program of arrangement with the unsecured creditors to avoid the final liquidating effect of bankruptcy, which is the alternative under the petition if the arrangement cannot be consummated.

Where the petition for an arrangement is not filed in a pending bankruptcy it is filed under Section 322 (11 U.S.C.A. §722) of the Bankruptcy Act.

Chapter XI, by the second section therein reads as follows:

> "Sec. 302. The provisions of chapters I to VII, inclusive, of the Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors,' and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such

application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication has previously been entered." (11 U.S.C.A., §702)

Under Section 306 of Article II of said Chapter XI a debtor who may file a petition is defined as follows:

"(3) 'Debtor' shall mean a person who could become a bankrupt under Sec. 4 of this Act and who files a petition under this Chapter; * * *." (11 U.S.C.A., §706)

The corporation comes under the exclusive control of the court just as in the case of any bankruptcy. By §311 of the Bankruptcy Act it is provided:

"Where not inconsistent with the provisions of this Chapter, the court in which the petition is filed, shall for the purposes of this Chapter, have exclusive jurisdiction of the debtor and his property wherever located." (II U.S.C.A. §711)

And by §312, the powers and duties of the court are provided for as follows:

"Where not inconsistent with the provisions of this chapter, the jurisdiction, powers, and duties of the court shall be the same—* * *

(2) "Where a petition is filed under Section 322 of this act as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed." (11 U.S.C.A., §712)

Under §313 (11 U.S.C.A., §713) the court may permit the rejection of executory contracts, the sale of property and may enjoin suits.

By §322 (11 U.S.C.A., §722) the debtor files the petition under Chapter XI with the court which would have jurisdiction of a petition for its adjudication as a bankrupt. By §323 (11 U.S.C.A., §723) the petition must state that the debtor is insolvent or unable to pay its debts as they mature.

Sections 326, 327 (11 U.S.C.A., §§726 and 727) contemplate the possibility of immediate adjudication as a bankrupt under the petition in the event such bond as may be required by the court is not furnished. Said sections provide:

> "Sec. 326. Where a petition is filed under section 322 of this Act, the court may, upon hearing and after notice to the debtor and to such other persons as the court may direct, order the debtor to file a bond or undertaking, with such sureties as may be approved by the court and in such amount as the court may fix, to indemnify the estate against subsequent loss thereto or diminution thereof until, in the event of the entry of an order of adjudication under this chapter, the entry of such order.
>
> "Sec. 327. Upon failure of the debtor to comply with such order for indemnity, as prescribed in section 326 of this Act, the court may, after hearing upon notice to the debtor, the creditors' committee, if any has been appointed and to such other persons as the court may direct, either adjudge the debtor a bankrupt and direct that bankruptcy be proceeded with pursuant to the provisions of this Act or dismiss the proceed-

> ings under this chapter, as in the opinion of the court may be in the interest of the creditors."

By §331 (11 U.S.C.A., §731) the judge may, as he did in the instant case, refer the proceedings to a Referee.

By §333 (11 U.S.C.A., §733) power is given to appoint appraisers and to file under oath an inventory and appraisal of the property of the debtor.

By §334 (11 U.S.C.A., §734) the court must promptly call a meeting of creditors upon at least ten days notice and by §336 (11 U.S.C.A., §736) the Referee receives proofs of the claim and may allow or disallow them, examines the debtor or causes him to be examined and by §338 (11 U.S.C.A., §738) the creditors may appoint a committee and may nominate a trustee who shall thereafter be appointed by the court in case it should become necessary to administer the estate in bankruptcy as provided under Chapter XI.

In other words, the stage is completely set for ordinary bankruptcy proceedings subject only to the single determination as to whether the proposed plan will be consummated.

Another important provision is §341 (11 U.S.C.A., §741) which provides that when not inconsistent with the provisions of Chapter XI, the powers and duties of the officers of the court and their fees and the rights, privileges and duties of the debtor shall be the same as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition

under Chapter XI was filed. Said §341 provides as follows:

> "Sec. 341. Where not inconsistent with the provisions of this chapter, the powers and duties of the officers of the court and, subject to the approval of the court, their fees, and the rights, privileges, and duties of the debtor shall be the same, where a petition is filed under section 321 of this Act and a decree of adjudication has not been entered in the pending bankruptcy proceeding, as if a decree of adjudication had been entered in such bankruptcy proceeding at the time the petition under this chapter was filed, or, where a petition is filed under section 322 of this Act, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed." (11 U.S.C.A., §741)

Again it is clear that practically everything proceeds on the basis of ordinary bankruptcy procedure subject only to the granting of an interim opportunity for the insolvent corporation to make an arrangement with its unsecured creditors.

And again by §352 (11 U.S.C.A., §752) rights, duties and liabilities are fixed as in the case of ordinary bankruptcy. Said §352 provides:

> "Sec. 352. Where not inconsistent with the provisions of this chapter, the rights, duties, and liabilities of creditors and all other persons with respect to the property of the debtor shall be the same, where a petition is filed under section 321 of this Act and a decree of adjudication has not been entered in the pending bankruptcy

proceedings, as if a decree of adjudication had been entered in such bankruptcy proceeding at the time the petition under this chapter was filed, or, where a petition is filed under section 322 of this Act, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed."

Article X of said Chapter XI provides for the procedure which admittedly took place in the instant case, that is adjudication of bankruptcy when the proposed arrangement is not consummated. Section 376 of the Bankruptcy Act (11 U.S.C.A., §776) provides where the petition has been filed under section 322 (11 U.S.C.A., §722) as was done in this case as follows:

"Sec. 376. If an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall . . .

"(2) Where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever, in the opinion of the court, may be in the interest of the creditors."

It will be further noted that no other pleading or application of any kind is to be filed or is in any way contemplated by §376. The court acts pursuant to law by virtue of the original petition filed under §322, Chapter XI (11 U.S.C.A. §722) as it did in this case when it found it to be in the interest of creditors to adjudicate Chemurgy a bankrupt and directed that bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Act.

Upon the entry of such an order the proceeding is then conducted so far as possible in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed at the time a petition for an arrangement was filed. Section 378 (11 U.S.C.A., §778) provides as follows:

> "Sec. 378. Upon the entry of an order directing that bankruptcy be proceeded with . . .
>
> "(2) in the case of a petition filed under section 322 of this Act, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed; and the trustee nominated by creditors under this chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the entry of such order, a trustee shall be appointed as provided in section 44 of this Act."

Under the foregoing section the nomination and appointment of a Trustee follows as in the case of any ordinary bankruptcy proceeding.

In the filing of this action and in taking the positions which he has taken in the District Courts and in this brief, the appellee is proceeding strictly in accordance with the foregoing Section 378 which contemplates that the filing of a petition under Chapter XI shall be treated as if a voluntary petition for adjudication in bankruptcy had been filed and the corporation adjudicated bankrupt on the day when the original petition under Chapter XI was filed.

We have gone into these provisions under Chapter XI of the Bankruptcy Act to show that the original petition filed May 29, 1947 was the petition pursuant to which the trustee was appointed. If said petition was not an application pursuant to which appellee was appointed then the unreasonable conclusion must be reached that in any Chapter XI proceeding which ultimately results in the appointment of a trustee after adjudication, such appointment results without application of any kind, thus unnecessarily rendering nugatory the provisions of Rem. Rev. Stat. §§5831-4 and 5831-6.

Furthermore, if the filing of the petition under Chapter XI is not treated as an application within the meaning of Rem. Rev. Stat. §5831-4 then the purposes of the State act will be defeated in practically all Chapter XI cases for the reason that whether or not the proposed plan can be consummated will take at least four months in most cases to determine. (In the instant case it took over six months for such determination). Obviously no payments on old debts will be made and payments made by the corporation to creditors granting credit while

the corporation is operating under order of the court after the filing of the original petition under Chapter XI could in no event be deemed preferential or within the scope of the State Act, but rather as costs of administration. Therefore, if the four months period is to be deemed terminated only when it is finally determined that the proposed arrangement cannot be consummated rather than when the petition is filed there will in effect be no four months period as contemplated by Rem. Rev. Stat. §§5831-4 and 5831-6. The result is that the State Act will be applied where ordinary bankruptcy proceedings are originally initiated but cannot be applied where a proceeding under Chapter XI is first initiated. The construction of the relevant statutes as submitted by appellee and found by the District Courts results in a reasonable application of the State statutes herein involved in all bankruptcy proceedings whether initiated by ordinary bankruptcy or by Chapter XI petition. The State statutes here involved were passed in 1941 after the passage in 1938 of the provisions of the Federal Bankruptcy Act found in Chapter XI. The State statutes clearly provide for recovery by Trustees in bankruptcy and in the face of the Federal Bankruptcy Act the State legislature still provided that the four months' period antedates the filing of a petition which results in the appointment of a liquidating officer regardless of how long it may take to find out the result of the petition.

A consideration of the history of the provision for this four months' period will assist in its construction. The present statute (Rem. Rev. Stat.

§§5831-4 and 5831-6) superseded Chapter 47 of the Laws of 1931, §2 (See Appendix p. 2). Prior to the 1931 statute the return of preferential payments was required by court made law and there being no limiting statute other than the ordinary statute of limitations, payments made several years prior to insolvency proceedings might be recovered. The purpose in restricting collection from creditors who had received payments without notice of insolvency of the corporation from whom such payments had been received was stated in *Seattle Association v. GMAC*, 188 Wash., 635@637, 63 P.(2d) 359@360 wherein the court stated:

> "As pointed out in *Meier v. Commercial Tire Co.* 179 Wash. 449, 38 P.(2d) 383 the obvious purpose of the legislature in enacting Chapter 47, Laws of 1931,
>
> "'* * * was to mitigate the harshness of the rule when applied to a creditor who in good faith and without knowledge of the insolvency has received a payment more than four months before the filing of an application for the appointment of a receiver'
>
> "Upon re-examination of the statute *we are still satisfied that it is its sole and only purpose.* Clearly it is not intended as a codification of all the rules relating to the Trust Fund Doctrine built up by the decisions of this court prior to its enactment." (Emphasis supplied)

It is clear therefore that the legislature determined that as a matter of policy a limited period of only four months should be substituted for the period of years in which a creditor receiving pay-

ments during such years might be required to return them. The legislature decided it would simply take four months of the normal course of business of the company and that would be the period during which payments received therein must be returned. In order to be practical about the matter, the legislature obviously fixed the date of the filing of the petition rather than the final appointment as the termination of the four months period because ordinarily with the publicity given to that type of proceeding normal functions will cease upon the filing of the petition. It has already been demonstrated that publicity and notice to all creditors is given upon the filing of a petition under Chapter XI just as in the ordinary bankruptcy proceeding. Notice goes out to all the creditors and the debtor comes under the arm of the court.

However, if the position of the appellant is adopted then the legislature has not only by the terms of the preference statute taken the former period of several years in which payments might be deemed preferences and squeezed it down to four months but in many cases it has eliminated the application of the Trust Fund Doctrine completely because as stated above it would ordinarily take at least four months to determine whether the petition under Chapter XI could be worked out, with the result that if the date of adjudication rather than the filing of the petition under Chapter XI is taken as the termination of the four months period then no preferences would be deemed to have occurred at all. The creditors are put on notice by the filing of the petition and

the proceedings taken thereunder, including notice to all creditors, that fairly apprises them that they can no longer deal with the corporation on the same basis as before and such payments as they have received in the preceding four months may have to be returned.

If appellant's contention is upheld then a flagrant misuse of Chapter XI proceedings may be adopted (which will be closed if appellee's position and the holding of the District Court is sustained). This is indicated when consideration is given to the facts in the instant bankruptcy. While in this case we make no charge of bad faith, nevertheless, the facts exist, which may be taken as an example of the possibilities, that a number of the larger payments sought to be recovered including some of those made to defendants listed on page 30 of the transcript were made to directors of the corporation during the four months antedating May 29, 1947. Said directors participated in initiating the Chapter XI proceedings. If directors can thus initiate proceedings under Chapter XI and hold such proceedings before a district court for a period of four months they can, under appellant's contention, free themselves from the necessity of returning payments which they should have returned if ordinary bankruptcy proceedings had been initiated at the time Chapter XI proceedings were begun.

The position of appellee closes the door to such misuse of Chapter XI, squares with the history and purpose of the State statute, is fair to all concerned

and provides for a full field of action both for the State statute and the Federal Bankruptcy Act.

On the other hand appellant's contention is squarely met by the provisions of Chapter XI which clearly provides that the filing of a petition thereunder may result in adjudication of bankruptcy and appointment of a Trustee *as a matter of law*. Appellant's contention also fails to square with the purpose of the State legislation providing for said four months' period and if adopted provides a method for directors or other persons in control of a corporation to defeat, through the use of the Chap. XI proceedings, the right of a liquidating officer on behalf of creditors to recover preferential payments under the State statute.

In conclusion on this point therefore, it is submitted that so far as this case is concerned the "date of application" referred to in Rem. Rev. Stat. §5831-4 is the date on which the original petition under Chap. XI of the Bankruptcy Act was filed, that is, May 29, 1947 and of course it is admitted that the payment here involved was made by Chemurgy while insolvent within the four months prior to said date.

II.

The Petition Under Chap. XI Was An Application Resulting in the Appointment of Appellee and Pursuant to Which He Was Appointed Within the Meaning of Rem. Rev. Stat. §5831-4.

The complaint in this case and the findings of the Court (Tr. 2-3 Tr. 22-23) show that the adjudication of bankruptcy and the resulting appointment

of appellee followed as a matter of law from the petition of May 29, 1947. It is true of course that the appointment of appellee as trustee was made when Chemurgy was unable to consummate the proposed arrangement but nevertheless the appointment followed as a result of and pursuant to the original petition for there was no other pleading of any kind on file and it was this petition which gave the court jurisdiction to proceed. The error of appellant is emphasized by his statement:

> "It was, then, the act of Chemurgy in proceeding under Sec. 776 (2) on December 13, 1947 that became its application for the appointment of a receiver or trustee within the meaning of Sec. 5831-4, Rem. Rev. Stat." (Appellant's br. 10)

There is no allegation in the complaint or any finding that Chemurgy proceeded in any way whatsoever on December 13, 1947 or prior thereto except by the filing of its petition on May 29, 1947.

§376(2) of the Bankruptcy Act (11 U.S.C.A., §776(2)) referred to in the complaint and findings makes it quite clear that the adjudication and subsequent bankruptcy proceedings all stem from the original petition and when the plan fails the court, as a matter of law, is required to take action under the original petition either for adjudication or dismissal of the proceedings. Said §376 of the Bankruptcy Act provides:

> "Sec. 376. If an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if

the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall * * *

"(2) where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors."

As stated by the District Court in his opinion (Tr. 10):

"The petition for arrangement, from its inception, serves the purpose of an alternative petition for adjudication. When the arrangement fails of accomplishment, adjudication and subsequent bankruptcy proceedings, including the appointment of a trustee follow as a matter of course. The petition for arrangement is the only petition, or application, ever filed, pursuant to which the appointment of the trustee is made. In legal effect, it is the same thing as the application for the appointment of the trustee."

The State statute certainly contemplates that an "application" of some kind be made. Nowhere in his brief does the appellant point out any fact to sustain a contention that under the provisions of Chap. XI or the facts of this case any application was contemplated or made other than the original

petition under Chap. XI. Certainly the hearing held December 13, 1947 and the order of adjudication entered that day were not applications for they followed as a matter of law from the petition filed May 29, 1947 which, by its legal effect and its terms prayed that proceedings may be had upon the petition in accordance with the provisions of Chap. XI of the Act of Congress relating to bankruptcy. The petition in fact stated:

> "Wherefore, your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of Chapter XI of the Act of Congress relating to bankruptcy."

As noted above, one of the proceedings under Chapter XI of the Bankruptcy Act which results when the arrangement cannot be consummated is the adjudication of bankruptcy (§376 of the Bankruptcy Act, 11 U.S.C.A., §776) and an order that bankruptcy be proceeded with pursuant to the general provisions of the Bankruptcy Act which of course includes the appointment of a trustee.

No reason is stated by appellant why the petition filed May 29, 1947 should not be deemed an application resulting in the appointment of appellee and appellant cites no authority in support of such contention. The point is without merit and was not even made a basis of objection at the time the District Court entered his findings and conclusions as required by Rule of Civil Procedure 46 (See Tr. 26).

As found by the District Court in its opinion (Tr. 10) the petition under Chap. XI was an application for a "receiver" within the meaning of Rem. Rev.

Stat. §5831-4 and when this holding is confirmed by this Court it must follow, as a matter of law, that appellee was appointed pursuant to said application for no other document, petition or application gave the bankruptcy court jurisdiction to appoint appellee as trustee except said original petition which, by the terms of §376(2) of the Bankruptcy Act (11 U.S.C.A. §776(2)) authorized the court under the circumstances of this case to proceed as in the case of ordinary bankruptcy.

III.

Section 11 E of the Bankruptcy Act and Not Rem. Rev. Stat. §5831-5 Provided the Applicable Period for the Commencement of This Action.

(a) Rem. Rev. Stat. §5831-5 not applicable.

Appellant contends that this action must fail because not brought within six months from the date of the application resulting in appellee's appointment and appellant bases his argument on this third and last point solely on Rem. Rev. Stat. §5831-5 quoted in the Appendix at p. 2.

This statute is not applicable for the following reasons:

a. By its terms Rem. Rev. Stat. §5831-5 applies only to actions filed in the courts of the State of Washington.

b. By its terms Rem. Rev. Stat. §5831-5 applies only when there is no other time limitation on the bringing of an action under Rem. Rev. Stat. §5831-6.

c. In any event, the statute, if applicable, is super-

seded by §11(e) of the Bankruptcy Act (11 U.S.C.A. §29(e)) quoted herein at page 41 which provided a period of two years subsequent to the date of adjudication of bankruptcy in which to commence this action.

Before discussing the several points just listed we pass to a consideration of the purpose of Rem. Rev. Stat. §5831-5. In construing the predecessor section in the 1931 Act (Appendix page 2) the court in *Peeples v. Hayes* 4 Wn.(2d) 253@257, 104 P.(2d) 305@307 held that the six months' limitation was not enacted for the purpose of aiding defendants but primarily for the benefit of creditors of the insolvent estate to avoid unreasonable delay in the recovery of preferences. The court stated:

> "Furthermore the limitation is not for the benefit of those against whom actions are brought, but it is primarily for the benefit of the creditors of the insolvent corporation on whose behalf the action is prosecuted. Its primary purpose is to insure that their rights in the trust fund will be enforced promptly and without unreasonable delay."

So this statute, which, under the interpretation given by the Supreme Court of the State of Washington is created simply as a shield for the creditors represented by the trustee would now be turned (if the appellant's interpretation is adopted) into a sword to strike down the right granted by Rem. Rev. Stat. §5831-6. As a practical matter there is of course no unreasonable delay if actions for the recovery of preferences are not brought during the pendency of Chapter XI proceedings. It is not feasible to go

around hat in hand asking creditors to approve a proposed plan of arrangement and at the same time meet them in the court house to sue them for the return of a preference. §391 of the Bankruptcy Act (11 U.S.C.A. §791) shows that Congress realized actions for the recovery of preferences or fraudulent transfers would not and should not be brought during the pendency of a Chapter XI proceeding because by this section the time for bringing such actions is suspended. This section provides:

> "Sec. 391. All statutes of limitation affecting claims provable under this chapter and the running of all periods of time prescribed by this Act in respect to the commission of acts of bankruptcy, the recovery of preferences and the avoidance of liens and transfers shall be suspended while a proceeding under this chapter is pending and until it is finally dismissed."

To urge, as appellant in support of this point must urge, that an action should have been brought during the pendency of the Chapter XI proceedings to recover this preference is unreasonable. Furthermore in an involved bankruptcy proceeding it takes a great deal of time to assemble the data upon which to make demand for the return of numerous preferences and then to commence actions against those of the creditors who do not respond to these demands. In the instant situation all of the actions for preferences, including the one here on appeal, were served and filed well within six months from the date of adjudication. In view of the pendency of the Chapter XI proceedings appellee was certainly prompt in this case and of course he in no event could have brought

the action within six months from May 29, 1947 as the corporation was not adjudicated bankrupt until December 13, 1947—more than six months after the filing of the petition and appellee's appointment was not made in said proceeding until January 6th, 1948. This action was served and filed within six months from said adjudication (Tr. 6).

Furthermore, Rem. Rev. Stat. §5831-5 cannot be applied, in any event, unless this action is clearly within its scope. In construing the preceding 1931 statute (relating to the recovery of preferences) (Appendix p. 2) the Supreme Court of Washington in *Seattle Association v. GMAC*, 188 Wash. 635 @640, 63 P.(2d) 359@361, stated:

> "The statute is one modifying the common law of this state. *Sterrett v. White Pine Sales Co.*, 176 Wash. 663, 30 P.(2d) 655. Such being its purpose, it will not be construed in derogation of the common law beyond its plain intent and scope."

Under the common law existing prior to the enactment of these preference statutes there was of course no limitation upon the commencement of actions to recover preferences.

Rem. Rev. Stat. §5831-5 being in derogation of the common law and not applicable unless an action is plainly within its intent and scope cannot be applied, in any event, to this case unless the words therein "*If not otherwise limited by law*" and "*actions in the courts of this state*" are both completely read out of the statute. This cannot be done because it is a cardinal rule of statutory construction that

effect is to be given to every word in the construction of statutes:

> "It is presumed that the words were used with reference to the subject matter of the act, *that some effect is to be given to each*; that no exceptions are to be made to general language." 59 C.J. 1012 (Statutes—Presumptions to Aid Construction) (Emphasis supplied)

Clause—"If not otherwise limited by law * * *."

As to the first clause in Rem. Rev. Stat. §5831-5, "If not otherwise limited by law," the intention of the legislature seems clear. It was enacting into statutory law a principle (trust fund doctrine) previously found only in decisions of the courts of this state. It desired to include a limitation on the bringing of preference actions but to impose such limitation *only in those cases in which there was no other limitation imposed by law with respect to the time in which such suits might be brought.* Furthermore, these words were placed in the Washington statute in 1941, three years subsequent to the enactment in 1938 of the Bankruptcy Act in its present form which includes the two year limitation on trustees in bankruptcy as the commencement of actions provided for in 1938 by §11(e) of the Bankruptcy Act (11 U.S.C.A. §29(e)). Much of the language in the Washington statute (Rem. Rev. Stat. §5831) is taken directly from similar provisions in the Federal Bankruptcy Act, and it must be presumed that the legislature knew of the Federal Bankruptcy Act and that the legislature could not impose a limitation binding on a trustee in bankruptcy when, as here-

inafter demonstrated, the power of Congress under the bankruptcy provisions of the Federal Constitution is sufficient to override and strike down state statutes inconsistent with federal bankruptcy provisions.

> "Numerous presumptions have been indulged in by the courts as aid in the construction of statutes. Thus, it has been presumed * * * *that the legislature acted with a full knowledge of the constitutional scope of its power * * **". 59 C.J. 1008 (Statutes—Presumptions to Aid Construction) (Emphasis supplied)

This clause had not been included in the 1931 statute (Appendix p. 2) and was a condition added by the State legislature in 1941 at the time the 1931 statute was repealed and the 1941 legislation (Appendix p. 1) took its place. On this point of legislative purpose we quote *Graffell v. Honeysuckle*, 30 Wn.(2d) 390, 191 P.(2d) 858, in which the court at page 399 stated:

> "In construing statutes which re-enact, with certain changes, or repeal other statutes, or which contain revisions or codifications of earlier laws, resort to repealed and superseded statutes may be had, and is of great importance in ascertaining the intention of the legislature, *for where a material change is made in the wording of a statute, a change in legislative purpose must be presumed. In re Phillips Estate*, 193 Wash. 194, 74 P.(2d) 1015 and cases therein cited; *Great Northern R. Co. v. Cohn*, 3 Wn.(2d) 672, 101 P.(2d) 985; *Longview Co. v. Lynn*, 6 Wn.(2d) 507, 108 P.(2d) 365." (Emphasis supplied)

In failing to hold with appellee on this point, Judge

Driver simply suggested that the reason for the inclusion of this clause was to leave room for the operation of the four-months period referred to in Rem. Rev. Stat. §5831-6 (Tr. 11). We submit, however, that the clause "If not otherwise limited by law" has no possible application to said four-months period. The subject matter of Rem. Rev. Stat. §5831-5 is the period in which *under certain circumstances* an action may be brought in the state court to recover preferences as defined in other sections of Chapter 103 of the Laws of 1941. Rem. Rev. Stat. §5831-6 has no possible implication with respect to the time for commencing an action but simply defines the four months period in which payments shall be deemed preferential. The subject matter of the two time periods (referred to in Rem. Rev. Stat. §5831-5 and §5831-6) is so dissimilar as to have no possible application to each other.

This clause, "If not otherwise limited by law", is plain and unequivocal and can be given meaning in accordance with its literal terms which are, in effect, that Rem. Rev. Stat. §5831-5 is applicable only *if there is no other limitation of time* binding on the liquidating officer acting under the preference statute which limits the plaintiff in the commencement of his action. In the instant case, such a limiting statute exists in §11(e) of the Bankruptcy Act (11 U.S.C.A. §29(e)) which statute was in effect when the Washington legislature enacted Rem. Rev. Stat. §5831-5.

Another reason why the suggestion of Judge Driver referred to above is not applicable is that

since this clause was included in the 1941 act when it was not included in the 1931 act, it must be presumed that a departure from the former law was intended, and such a departure would not have been effected under Judge Driver's suggestion since a four-months period had been included in the 1931 statute and the clause "If not otherwise limited by law" was not included in the 1931 statute. This presumption that a departure from the old law was intended is emphasized in *Graffell v. Honeysuckle*, 31 Wn.(2d) 309@400, 191 P.(2d) 858, in which the court stated:

> "The following statement, taken from 50 Am. Jur. 261, Statutes, Sec. 275, expresses the general attitude of the various courts in construing amendatory statutes:
>
> " 'In making material changes in the language of a statute, the legislature cannot be assumed to have regarded such changes as without significance, but must be assumed to have had a reasonable motive. Where a statute is amended, it will not be presumed that the difference between the two statutes was due to oversight or inadvertence on the part of the legislature. To the contrary, the presumption is that every amendment of a statute is made to effect some purpose, and effect must be given the amended law in a manner consistent with the amendment. The general rule is that a change in phraseology indicates persuasively, and raises a presumption, that a departure from the old law was intended, and amendments are accordingly generally construed to effect a change, particularly where the wording of the statute is radically different.'

"See, also, 59 C.J. 1097, Statutes, Sec. 647."

The most reasonable interpretation is that the State legislature added this clause because of §11(e) of the Bankruptcy Act which was added in 1938 and the legislature wanted no intimation of conflict with this Federal Statute which provided a limitation on the bringing of preference actions by trustees in Bankruptcy.

The reasoning upon which Rem. Rev. Stat. §5831-5 must be held not applicable to this action is as follows:

1. The phrase "If not otherwise limited by law" refers to a limitation upon the time for commencing an action to recover preferences under the Washington statute.

2. §11(e) of the Bankruptcy Act (11 U.S.C.A. §29(e)) (quoted on p. 41 of this brief) provides a limitation of time in which this action may be brought.

3. A limitation in time having been provided by law, the condition precedent to the application of §5831-5 is not present and said section is not controlling or relevant in this case.

Clause—"* * * actions in the courts of this state * * *."

As to this clause the legislature must be presumed to have known the fact that many cases have been brought under state preference statutes and principles (including the Washington trust fund doctrine) in federal courts. Furthermore, it is obvious that a creditor having received a preference cannot escape

the obligation to return it simply by removing himself from the state in which he received it and that actions would have to be brought in other states or in federal courts. The simplest situations will usually arise in common law assignments or state receiverships where the receiver ordinarily sues in the Washington state court and is not burdened with the many duties imposed by the Bankruptcy Act and General Orders on trustees in bankruptcy or the difficulties of foreign litigation, and the state legislature has chosen to restrict the harsh limitation of six months to the field of cases brought in the Washington state courts.

But whatever the reason may be, there can be no escape from the plain fact that the legislature chose to restrict the application of Rem. Rev. Stat. §5831-5 to actions filed in the courts of the State of Washington. And to apply §5831-5 to an action in other courts would require a re-writing of, and deletion from, the statute as enacted by the legislature.

As noted above, to extend the statute to situations not clearly and explicitly covered would be contrary to the construction of the similar preceding 1931 statute by the Supreme Court of Washington in *Seattle Association v. GMAC*, 188 Wash. 635@640, 63 P.(2d) 359, wherein the court stated:

> "The statute is one modifying the common law of this state. *Sterrett v. White Pine Sales Co.*, 176 Wash. 663, 30 P.(2d) 665. Such being its purpose, it will not be construed in derogation of the common law beyond its plain intent and scope."

The plain intent and scope of Rem. Rev. Stat. §5831-5 is restricted to "actions in the courts of (Washington)".

This statute (Rem. Rev. Stat. §5831-5) is not the statute which granted appellee the power to sue. This unequivocal power is granted by the plain words of Rem. Rev. Stat. §5831-6 reading as follows:

> "Any preference made or suffered within four months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four-months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preferences made beyond such four-months' period are hereby specifically superseded."

Rem. Rev. Stat. §5831-5 provides a limitation only in the specific instances set out in its express terms and the limitation is applicable only when the two necessary conditions precedent are present:

a. *There is no other limitation prescribed by law on the bringing of an action under Rem. Rev. Stat. §5831-6;* and

b. *The action is filed in the state courts of Washington.*

Effect must be given to all words in a statute.

> "It is presumed that the words were used with reference to the subject matter of the act, *that some effect is to be given to each;* that no exceptions are to be made to general language." 59 C.J. 1012 (Statutes—Presumptions to Aid Construction) (Emphasis supplied)

Judge Black held in his oral opinion, referred to above, overruling the motions to dismiss filed by those creditors of Chemurgy who resided in the Western District of Washington and who failed to return preferential payments, that Rem. Rev. Stat. §5831-5 was not applicable because the actions were not brought in the courts of the state of Washington.

The legislature of the state of Washington has demonstrated an unwillingness to extend further than to the exact situations defined in Rem. Rev. Stat. §5831-5, the severe and drastic limitation of six months into fields or circumstances where other limitations are established by law or to cases in courts other than the courts of the state of Washington. The legislature having thus failed to extend the statute, we submit that the courts should not so apply it, especially when the language of the statute is clearly restricted in application. The ease with which the restrictive provision might have been made applicable to all actions filed to recover preferences as defined by the state statute cannot be ignored in determining the intent of the legislature.

Finally it should be noted that the two cases cited by appellant with respect to Rem. Rev. Stat. §5831-5 were both decided prior to the enactment in 1941 of Rem. Rev. Stat. §5831-5 here discussed and were, of course, actions filed in the state court. The two clauses of Rem. Rev. Stat. §5831-5 here discussed were therefore not mentioned in either of the two cases cited by appellant, that is, *Morris v. Orcas Lime Co.*, 185 Wash. 126, 53 P.(2d) 604, or *Peeples v. Hayes*, 4 Wn.(2d) 253, 104 P.(2d) 305.

(b) The time for commencing this action was, in any event, governed by 11(e) of the Bankruptcy Act (11 U. S. C. A. §29(e)).

Section 11(e) of the Bankruptcy Act (11 U.S.C.A. §29(e)) provides as follows:

> "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the federal or state law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement, or in the proceeding or by applicable Federal or State law, as the case may be."

All of the three District Judges above mentioned, in passing on the Chemurgy preference complaints, held that this §11e rather than Rem. Rev. Stat. §5831-5

governed the period of time in which action might be instituted by a Trustee in bankruptcy under Rem. Rev. Stat. §§5831-4 and 5831-6. The portion of Judge Driver's opinion on this point is on pages 13 to 17 of the transcript.

In the District Court appellant argued that Congress had no power to enact §11(e) so as to supersede limitations such as that contained in Rem. Rev. Stat. §5831-5. In view of the constitutional provisions quoted to the District Court and the many cases contained in appellee's briefs filed in the District Court and referred to in the District Court's opinion holding that under the bankruptcy provision of the Federal Constitution substantive rights may be affected by Congress, appellant has now abandoned his position that Congress had no constitutional power to enact §11(e) as construed by the District Court *and now relies solely on the contention that it was not the intention of Congress by the enactment of §11(e) to affect substantive rights.* At page 23 of his brief appellant now makes the following admission:

> "At some length the trial judge, in his opinion (Tr. 7), vindicates the right of Congress under its power to enact bankruptcy legislation to affect substantive rights. That we do not deny."

By Article I, Sec. 8, Clauses 4 and 18 of the Federal Constitution it is provided:

> §8, Powers of Congress—
>
> "The Congress shall have power, * * *
>
> To establish an uniform rule on naturalization; and uniform laws on the subject of bankruptcies throughout the United States; * * *

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States or in any department or officer thereof."

The Federal Congress acting pursuant to the foregoing constitutional power enacted §11(e) of the Bankruptcy Act (11 USCA 29(e)). The broad language of §11(e) indicates clearly the purpose of Congress to set aside all time limitations on the bringing of suits by a trustee whether relating to right or remedy and for the protection of bankrupt estates and the uniform administration thereof to provide a uniform time limitation as laid down by Congress. As will be noted from the second sentence of the section, this section also deals not only with legal court actions but to all proceedings of every kind whether established by agreement or by State law, clearly evidencing the intention of Congress to supersede time limitations whether arising as a matter of procedure or as a matter substantive right.

Congress could have expressly restricted the field within which the two year limitation was to be operated had it so wished. Its failure to do so cannot be ignored.

Herget v. Central National Bank & Trust Co., 324 U.S. 4.

As was stated by the Supreme Court of the United States in *Herget v. Central National Bank & Trust Co.*, 324 U.S. 4, @ pages 7 and 8:

> *"Congress could have expressly restricted the field within which the two year limitation was*

> *to be operative had it so wished. Its failure to do so cannot be ignored* * * *. Section 11(e) is not limited by its words to actions inherited by the Trustee; nor does it discriminate against actions by the trustee accruing to him under the act. It provides simply that the trustee must bring action *on any claim* in behalf of the estate within two years subsequent to the date of adjudication or within such further time as the Federal or State law permits, provided that such law did not bar the action on the date when the petition was filed." (Emphasis supplied)

Obviously, all actions (except actions resting solely on the Bankruptcy Act and actions arising after adjudication in the course of bankruptcy administration) brought by a trustee must be deemed in the last analysis to be "inherited" either from the bankrupt or the bankrupt's creditors in the sense that the trustee either sues to recover money or property which the bankrupt could itself have recovered or he sues (as in the case of suits under the Washington Preference statute) to recover property which under some rule or law or statute has been obtained or held in violation of the rights of the creditors of the bankrupt estate.

But however the matter may be viewed it is obvious that the cause of action existed either by "inheritance" or by the terms of the Bankruptcy Act for the appellant does not contend on this point that there never was a cause of action to recover the amount herein sued for, but only that the time has elapsed in which suit may be brought. *Herget v. Central National Bank & Trust Co.*, *supra*, speaks authoritatively on this point

and holds that §11(e) covers whether the action is inherited or not:

> "Section 11e is not limited by its words to actions inherited by the trustee; nor does it discriminate against actions by the trustee accruing to him under the Act. *It provides simply that the trustee must bring action on any claim in behalf of the estate within two years subsequent* to the date of adjudication or within such further time as the Federal or State law permits, provided that such law did not bar the action on the date when the petition was filed." (Emphasis supplied)

The history of the case and statutory law prior to the enactment of §11(e) demonstrates clearly that it was the intention and purpose of Congress to supersede all statutes and agreements which either as a matter of procedure or of substantive law might otherwise limit the time in which a trustee in bankruptcy might act on behalf of the bankrupt estate. Prior to the passage of the Chandler Act (52 Stat. 840) in 1938, Section 11(d) of the Bankruptcy Act of 1898 (30 Stat. 544, 549) (Appendix p. .....) barred actions brought by or against trustees subsequent to two years after the bankrupt estate had been closed. There was a difference between the various courts as to whether the former §11(d) (superseded by §11(e)) applied only to cases which could be brought solely because of the provisions of the Bankruptcy Act or whether §11(d) also applied to actions resting in whole or in part on State law. *In this controversey reliance was sometimes placed in rejecting the application of §11(d) on the fact that the time limitation*

was included in the State statute providing for the asserted right.

An example of a holding that the former §11(d) superseded state limitation statutes even when contained in the statute creating the right which the trustee sought to enforce is *In re Handy-Andy Stores of Louisiana, Inc.*, 51 F.(2d) 98. This case, decided in 1931, involved the Louisiana Bulk Sales Law which included a provision that:

> "* * * provided further, that no proceeding at law or in equity shall be brought against the transferor to invalidate any such transfer after the expiration of ninety days from the consummation thereof."

The court held the ninety-day limitation provision had been superseded by the two year period provided for in the former §11(d) of the Bankruptcy Act which was then in effect. The court stated:

> "The bank has also plead the prescription of ninety days provided in section 3 of Act 270 of 1926. However, the chattel mortgage was dated February 20, 1929, and the petition for adjudicating the Handy-Andy Company a bankrupt was filed on April 22 of the same year, or within sixty-one days. Bankruptcy was resisted by the defendant, and some fifty other persons alleging themselves to be creditors intervened and joined in the demand that there be no application, among them being Roy B. McPherson, the mortgagee, who was then claiming to be a creditor for $15,000, and numerous other creditors who were among those receiving payment out of the funds which had been realized from the loan now under consideration. Defendant was finally adjudged

bankrupt on June 20, 1929. The rights of all parties are determined as of the date of the filing of the petition for adjudication, whether voluntary or involuntary. Collier on Bankruptcy, (13th Ed.) vol. 1, pp. 657, 658, *et seq.*, and authorities in foot notes. If prescription has not run at that time for or against the bankrupt, the provisions of both State and Federal statutes are superseded by paragraph d of section 11 of the Bankruptcy Act, 11 USCA No. 29 (d) itself. See same authority, vol. 1, p. 425 *et seq.*, and authorities cited. So that I am of the view that the ninety-day provision of section 3 of Act 270 of 1926, of the state ceased to apply from the date of filing of the petition, and the trustee had the time allowed by section 11 of the Bankruptcy Act (11 USCA No. 29) in which to make an attack upon the mortgage."

The former conflict between the courts in the interpretation of §11(d) is discussed in detail in *Issacs v. Neece* (CCA 5th) 75 F.(2d) 566 and is illustrated by the cases listed in Footnote 4 to *Herget v. Central National Bank & Trust Co.*, 324 U.S. 4, 89 L. ed. 656.

The purpose of the enactment of §11(e) in 1938 was to set at rest all of this controversey and dry up the previous well of uncertainty. If the argument of the appellant herein is adopted to the effect that a court must first determine the nature of the cause of action or the nature of the limitation before the application of §11(e) can be determined, then Congress has failed in its purpose to set at rest all previous controversies on this point and to establish a uniform

period of time applicable to all actions brought by the trustee "*upon any claim*" (§11(e)).

The Supreme Court of the United States has rejected the contention of appellant for it has stated that the entire problem created by these previous controversies has been settled by the enactment of §11(e). In *Herget v. Central National Bank & Trust Co.*, 324 U.S. 4, 89 L.ed. 656 the court stated:

> "But courts differed as to whether Sec. 11(d) or State statutes of limitation applied to causes of action inherited by the Trustee from the bankrupt or the bankrupt's creditors. (citing cases *which included those involving statutory rights containing limitations.*)
>
> "It was this conflict under section 11(d) of the 1898 Act that was primarily responsible for the framing of the new Sec. 11(e) in 1938. *This latter provision,* which is controlling in this case, *settles the problem* by stating in part that:
>
> " 'A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy.' "

If appellant's contention is valid then the Supreme Court is wrong and the problem has not been settled but remains open and the nature of the limitation on the claim asserted by a trustee in bankruptcy must still be examined in every case to determine whether §11(e) is or is not applicable.

McBride v. Farrington, 60 F. Supp. 92.

The significance of *McBride v. Farrington,* 60 F. Supp. 92 lies in part in that it is the most recent in point of time of any of the cases cited herein or to the District Court with respect to §11(e) and Judge Fee there points out that "the Act of 1938 changed the whole situation with regard to limitations under the Bankruptcy Act."

The importance of the opinion of Judge Fee also lies in part in the fact that he has obviously given great study to §11(e) and the history of the cases prior to its enactment and he arrived at the conclusion that the former cases which held that a trustee was bound by the limitations in State statutes were no longer the rule and that the Act of 1938 established a fixed period of two years in all cases. This is clear from the following two quotations from his opinion:

> "Before the passage of the Act of 1938 it had been consistently held in the Ninth Circuit that to such an inherited cause of action the general statute of limitations prescribed by the particular state applied. This was the more logical since it is a principle agreed upon with unanimity that where a right of action given by a particular state was conditioned in the same statute by limitation, the expiration of the period thus set would bar the remedy, notwithstanding the language of the old Clause 11, sub. d. Universally the courts maintained that where the general law of the State had provided the right in a creditor, that if the law of the general limitations set up by the State had barred the remedy in the creditors the trustee could not revive it. This was founded upon the proposition that the trustee was enfor-

cing a right based upon rights inherited from the bankrupt, or the creditors, and for which remedies were given by State law. * * * *There were, it is true, cases holding that old Sec. 11, sub. (d) was a true statute of limitations and if the remedy of a creditor were alive on the date of filing the petition, it lingered on available to the trustee until two years after final closing* * * *.

"The Act of 1938 changed the whole situation with regard to limitations under the bankruptcy act. The conflict between the courts regarding the interpretation of old Sec. 11 sub. d, was 'primarily responsible for the framing of the new Sec. 11, sub. (e) in 1938, (11 U.S.C.A. §29, sub. (e)).' The new section 11, sub. (e) was obviously a compromise and extended the limitations laid down by the state statutes under the interpretation of *Davis v. Wiley, supra*, to a fixed period of two years beyond the date of adjudication." (Emphasis supplied)

Sproul v. Gambone, 34 F. Supp. 441.

Sproul v. Gambone, 34 F. Supp. 441 is directly in point herein and completely supports the position of appellee that §11(e) supersedes Rem. Rev. Stat. 5831-5 as applied to this section, if §5835-5 is deemed by the court to be otherwise applicable. In the *Sproul* case the Pennsylvania Bulk Sales Law required that a proceeding be brought against the purchaser to invalidate any sale prohibited by the Bulk Sales law within ninety (90) days from the consummation thereof. The action was not brought by the trustee in bankruptcy until after said ninety day period. The decision thoroughly analyses the holdings of the

courts prior to the enactment of §11 (e) of the Bankruptcy Act, sets forth the legislative history of the section and approaches the whole question in a most fundamental manner including reliance upon the well established principle that state statutes must yield to the requirements of bankruptcy administration. The plaintiff relied upon §11(e) to strike down the ninety day provision of the State statute and the court states:

> "In our opinion the plaintiff is right in his contention. The ninety-day limitation of the Pennsylvania Act ceased to apply in this case from the time the petition in bankruptcy was filed; and the trustee's right of action was from then on limited only by the provisions of Section 11, sub. 3, of the Bankruptcy Act. See *In re Handy-Andy Stores of Louisiana, D.C.*, 51 F.(2d) 98; *Isaccs v. Neece*, 5 Cir., 75 F.(2d) 566."
>
> "The legislative history of Section 11 clearly indicates Congress was introducing a new provision into the law to cover situations such as exists in the instant case. See original Judiciary Committee Print of the Chandler Act on H.R. 12889, 74th Congress, 2nd Session H.R. 8046, as will be seen by the following foot note to Section 11:
>
> " 'The principal changes proposed in this Section are:
>
> " 'An extension of the limitation to receivers.
>
> " 'A new provision whereupon receivers and trustees may bring action upon claims expiring by state laws between the date of the filing of the petition and the date of adjudication.
>
> " 'A new provision whereupon the operation of state statutes of limitation is suspended.

> "This all leads us to the conclusion that defendant's motion to dismiss must be denied, whether the statute of limitations bars either the right or the remedy, for as we view the law, the state statute as to limitation must yield to the requirements of bankruptcy administration. See *Van Huffel v. Harkelrode*, 284 U.S. 225, 228, 52 S.Ct. 115, 76 L.ed. 256, 78 A.L.R. 453."

In re Appalachian Publishers, Inc., 29 F. Supp. 1021, not persuasive.

The sole case cited by the appellant in support of his position that §11(e) does not supersede Rem. Rev. Stat. §5831-5 is *In re Appalachian Publishers*, 29 F. Supp. 1021, a case decided by a Tennessee district court in 1939. The case lacks persuasion because of a failure to even refer to §11(e) of the Bankruptcy Act so that we may know conclusively whether or not it was advised of the enactment of §11(e) or whether it was simply considering the former §11(d). Furthermore the case was decided six years prior to the decision in *Herget v. Central National Bank & Trust Co.*, 324 U.S. 4, 89 L.ed. 656, discussed above and the Tennessee court of course did not have the analysis and holding of the Supreme Court in the *Herget* case before it, especially that portion which emphasized the broad sweep of §11(e) and its purpose to set at rest all questions concerning the application of the two year period to all actions. The subsequent case of *Sproul v. Gambone*, 34 F. Supp. 441, discussed above is based on far more study and analysis than *In re Appalachian Publishers* and as a result speaks with far more authority.

In rejecting the case of *In re Appalachian Publishers, Inc.*, Judge Driver in his opinion (Tr. 16-17) stated:

> "The case of *In re Appalachian Publishers, Inc.*, 29 F. Supp. 1021, appears to be contrary to my views. There the court held that a special limitation in a Federal Statute (Note: Judge Driver undoubtedly meant "State Statute") took precedence over the general two-year limitation in the Bankruptcy Act. However, the opinion does not discuss Section 11(e) of the Chandler Act and the case was decided in 1939, before the Supreme Court, in *Herget v. Central Bank Co.* (cited in footnote 6), had expressed its conception of the broad reach of that section. At any rate, I do not accept the theory that when a statute, creating a right of action, imposes a time limit on its exercise, the right does not come into existence at all unless and until an action to enforce it is instituted within the specified time. I prefer the reasoning, implicit in *Sproul v. Gambone*, that such a limitation does not prevent the genesis of the right, but only makes provision for its expiration when the limitation has run.
>
> "In the present case, upon the filing of the petition for appointment of a trustee, within four months after the preference alleged in the complaint, a right of action came into being under the terms of the State statute and the right continued to exist for a period of six months. At the expiration of that time, the right of action ordinarily would have died, but in this case, Section 11(e) of the Bankruptcy Act preserved and extended it for the period of two years subsequent to adjudication."

Charlesworth v. Hipsh, Inc., 84 F.(2d) 834 distinguished.

The case of *Charlesworth v. Hipsh, Inc.*, 84 F.(2d) 834 has been effectually distinguished and held to be of no force or effect so far as the interpretation of §11(e) of the Bankruptcy Act is concerned by the court in *Sproul v. Gambone*, 34 F. Supp. 441 at p. 443-444, wherein the court stated:

> "A contrary view is expressed in *Charlesworth v. Hipsh, Inc.*, 8 Cir., 84 F.(2d) 834, 835. That case involved an action by a trustee to recover a payment made to creditors of a bankrupt out of the proceeds of a bulk sale, as a preference. The trustee contended that the payment was voidable under the Missouri Bulk Saues Act; but the court held that the Missouri Bulk Sales Act was inapplicable and even if applicable, the ninety-day-limitation period had expired; and this statute of limitations was not tolled by the old Section 11, sub. d of the Bankruptcy Act, 11 U.S.C.A. Sec. 29, sub. d. This ruling was therefore not necessary to a decision of the case, and must be regarded as only dictum. In addition, it appears to us that the authorities cited, *Charlesworth v. Hipsh, supra; The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.ed. 358; *Western Fuel Co. v. Carcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.ed. 210, are not in point, as they are admiralty cases where there was no common law or statutory right to recover for death on the high seas; and the admiralty court applied a state statute allowing recovery in a civil action for wrongful death. The case of *Ford, Bacon & Davis, Inc. v. Volentine*, 5 Cir. 64 S.(2d) 800, cited in support of the decision in the case of *Charlesworth v. Hipsh, supra*, was a suit in a Federal court by reason of

diversity of citizenship and the question at issue was whether the statute of limitations of Mississippi or Louisiana should apply. Then, too, in the *Charlesworth* case, the court was considering Section 11, sub. d., of the Bankruptcy Act of 1898."

Doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64, not applicable.

In support of his contention that §11(e) of the Bankruptcy Act was not intended to effect statutory limitations on the commencement of actions as distinguished from pure statutes of limitation, appellant cites *Erie Railroad Co. v. Tompkins*, 304 U.S. 64. Appellant in citing this case misconstrues its reasoning and holding as applied to the present circumstances. The *Erie* case involved a simple personal injury action in which the plaintiff's rights rested solely on "common law" (no Federal powers or statutes were involved). The fundamental point was the extent to which the Federal Judiciary Act of 1789 (28 U.S.C.A. §725) should be extended in the application of general rules of "common law." This statute expressly recognized the paramount authority of the Federal Constitution and statutes wherever applicable because it reads:

> "The laws of the several States, *except where the Constitution, treaties or statutes of the United States otherwise require or provide*, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." (Emphasis supplied)

In the *Erie* case (p. 78) the court expressly recog-

nized the supremacy of the Federal Constitution and Acts of Congress over state law:

> "Third. *Except in matters governed by the Federal Constitution or by Acts of Congress, the* law to be applied in any case is the law of the state." (Emphasis supplied)

In the *Chemurgy* case the statute of the United States (Bankruptcy Act §11(e)), enacted pursuant to constitutional power, requires and provides otherwise than the law of the State (if the state law—Rem. Rev. Stat. §5831-5—is deemed applicable) and therefore the rule of the *Erie* case is obviously not applicable.

By Article I, Sec. 8, Clauses 4 and 18 of the Federal Constitution it is provided that:

> "The Congress shall have power, * * *
>
> "To establish an uniform rule on naturalization; *and uniform laws on the subject of bankruptcies throughout the United States;* * * *
>
> "*To make all laws which shall be necessary and proper for carrying into execution the foregoing powers* and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." (Emphasis supplied)

The Federal Congress, acting pursuant to the foregoing constitutional power, enacted §11(e) of the Bankruptcy Act (11 U.S.C.A. §29(e). *Erie v. Tompkins, supra,* is therefore, by the very terms of the statute (28 U.S.C.A. §725) it was interpreting, inapplicable and the provisions of the State statute (if applicable with respect to the assertion of the right given the trustee), must yield to the requirements of bankruptcy administration, As was said in *Sproul v. Gambone,* 34 F. Supp. 441:

> "This all leads us to the conclusion that appellant's motion to dismiss must be denied, whether the statute of limitation bars either the law or the remedy, for as we view the law, the State statute as to limitations must yield to the requirements of bankruptcy administration."

The Constitutional provision on bankruptcy above referred to emphasizes the element of *uniform laws* on the subject of Bankruptcy. Whenever Congress acts in a field allocated by the Constitution to its exclusive control, Federal action in that field of course takes precedence over and supersedes state action. State action in such a field is controlling only in the absence of Federal action. Sec. 11(e) therefore, is paramount in respect of the subject of limitation of action by trustees insofar as bankruptcy estates are affected.

A proceeding in bankruptcy is a proceeding *in rem* as well as *in personam*. Hence, when the Federal Court takes jurisdiction of the estate of a bankrupt, all the regulatory provisions of the Bankruptcy Act immediately attach. One of these is contained in §11 (e) of the Act. The Act of Congress on this subject of limitations in respect to Bankruptcy estates superseded all others.

As was stated in *Gage v. Du Puy* (Ill.) 19, N.E. 878, with respect to the limitation provision in the Bankruptcy Act prior to the 1938 Act:

> "And the Congress of the United States, having plenary power in regard to all matters of bankruptcy, when it chooses to exercise it, had the undoubted power to enact, as was enacted, limiting the time of bringing suits in all courts, state

> as well as United States—between assignees in bankruptcy and claimants to adverse interests in property transferred to them."

Furthermore, Mr. Justice Brandeis who had previously written the opinion in the *Erie* case also wrote the opinion in *Van Huffel v. Harkelrode*, 284 U.S. 225, 76 L.ed. 256, in which the court held that Congress had the power to set aside state laws with respect to the collection of taxes and to provide for their collection in another manner provided by the Bankruptcy Act. The opinion there stated:

> "To transfer the lien (of state taxes) from the property to the proceeds of its sale is the exercise of a lesser power; and legislation conferring it is obviously constitutional. Realization upon the lien created by the state law *must yield to the requirements of Bankruptcy administration.* Compare *International Shoe Co. v. Pinkus*, 278 U.S. 261, 73 L.ed. 318, 49 S.Ct. 108; *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 75 L. ed. 645, 51 S.Ct. 270;*Straton v. New*, 283 U.S. 318, 75 L.ed. 1060, 41 S.Ct. 465. In many of the cases in the lower Federal Courts the order of sale entered was broad enough to authorize a sale free from tax liens as well as from others; and in some of them it appears affirmatively that liens for taxes were treated as discharged by the order. No case has been found in which the power to sell free from the lien of State taxes was denied." (Emphasis supplied)

A practical application of this subrogation of state taxes to costs of administration is found *In re Empire Granite Co.*, 42 F. Supp. 450, in which the court stated at page 458:

> "The result is that where unsubordinated liens under Sec. 67 and debts under 64 (1) and (2) exhaust the fund, taxes on personal property, not accompanied by possession, cannot be paid. §67, sub. c."

Since Congress, under the Constitution, has the power to set aside State laws with respect to the matter most important to the States, that is, the collection of its taxes in the absence of which all functions of the State must terminate, there can be no successful challenge to the Congressional power to fix the time in which rights on behalf of the bankrupt estate may be asserted.

The cases illustrate many instances in which the Bankruptcy Act strikes down various inconsistent state statutes. Language such as the following from *City of New Orleans v. Harrell*, 134 F.(2d) 399@400 can be found in substance in many cases. The state statute there involved was a statute granting a lien in insolvency proceedings to a municipality for taxes on personalty. The court stated:

> "If an inchoate lien for taxes be perfected under said Section 67, sub. b, the debt secured by said lien is nevertheless postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of Section 64 of said Act of June 22, 1938. This enactment by Congress suspended the operation of state insolvency laws from the time of such enactment, subject only to such limitations as were or may be prescribed in the Bankruptcy Act; and Section 8435-1 of Dart's La. Gen. Stats. (La. Act 47 of 1936), has no application to the facts of this case, because it conflicts with the provisions of the Bankruptcy Act above cited.

The Washington preference statute is certainly an "insolvency law" in the sense of a law operative in the event of insolvency, just as much as was the Louisiana statute involved in the foregoing *Harrell* case, which gave cities a first lien on personal property in insolvency proceedings. (Act La. No. 47, of 1936). And in the *Harrell* case it was stated:

> "This enactment by Congress suspended the operation of state insolvency laws from the time of such enactment, subject only to such limitations as were or may be prescribed in the Bankruptcy Act; and Section 8435-1 of Dart's La. Gen. Stat. (La. Act 47 of 1936), has no application to the facts of this case, because it conflicts with the provisions of the Bankruptcy Act above cited." Citing many cases including the following:
>
> *Tua v. Garriere, et al.*, 117 U.S. 201, 210, 6 S.Ct. 565, 29 L.ed. 855;
>
> *Butler v. Goreley*, 146 U.S. 303, 314, 13 S. Ct. 84, 36 L.ed. 981;
>
> *International Shoe Co. v. Pinkus*, 278 U.S. 261, 49 S.Ct. 108, 73 L.ed. 318;
>
> *Carling v. Seymour Lumber Co.* (CCA 5) 113 F. 483, 51 C.C.A. 1.

The foregoing cases all demonstrate that Congress has shown no reluctance to supersede State laws when Congress has deemed it advisable to do so in carrying out the mandate of the Constitution to enact "uniform" laws governing bankruptcy. Certainly few matters call for a uniform rule more urgently than the establishment of a fixed period in which trustees may know that they can and must act on behalf of the

estate especially as a trustee simply must have an adequate oportunity to examine into facts and make arrangements for the commencement of actions. The many duties imposed by the Bankruptcy Law and General Orders which fall on a trustee immediately upon his appointment require, for the protection of the estate, that an adequate opportunity be given, to commence actions which may be discovered upon a proper examination with respect to the bankrupt estate. Furthermore, numerous limitations in State statutes such as the ninety-day-limitation in *Sproul v. Gambone*, 34 F. Supp. 441 have frequently practically expired before bankruptcy proceedings, often initiated primarily because of the transactions sought to be avoided, are or can be initiated and without §11(e) such rights might be lost to the creditors of the insolvent estate.

In conjunction with the *Erie Railroad Co.* case discussed above, appellant also quotes from the following cases:

Guaranty Trust Co. v. York, 326 U.S. 99, 101;

Ford, Bacon & Davis, Inc. v. Volentine, 64 F.(2d) 800, 802;

Western Fuel Co. v. Garcia, 257 U.S. 233, 243;

Vaughn v. U. S., 43 F. Supp. 306, 308;

Wilson v. Railway Co., 58 F. Supp. 844, 847;

Garrett v. Moore-McCormack Co., 317 U.S. 239, 245.

Appellant at page 19 of his brief admits that the

Erie Rd. Co and *York* cases are not in point here. The balance of said quotations are likewise not in point because they either simply discuss the difference between a procedural statute of limitations and the limitation contained in a statute granting a right or they discuss the deference which the federal courts will give to state statutes in fields where Congress has not acted. None of these cases of course involve in the slightest degree the Bankruptcy Act in general or §11(e) thereof in particular. None of these cases involve an instance where Congress has acted to supersede or suspend state law. Therefore, none of these cases can have any persuasive or other effect herein.

Summarizing, we submit that §11(e) of the Bankruptcy Act (11 U.S.C.A. 29 (e)) rather than Rem. Rev. Stat. §5831-5 is the controlling statute in this case with respect to the period in which this action could be commenced. §11(e) is broad and all inclusive in its language, admits of no exception and is clearly illustrative of an instance where Congress, acting pursuant to its constitutional power, has superseded state laws in conflict therewith. Section 11(e) preserved and extended the right granted by Rem. Rev. Stat. §§5831-4 and 5831-6 for the period of two years subsequent to the adjudication of *Chemurgy's* bankruptcy.

CONCLUSION

Each of the contentions of appellant should be overruled for the following reasons:

1. The filing of a petition by Chemurgy on May 29, 1947 under Chapter XI of the Bankruptcy Act was an application for a receiver (defined by Rem. Rev. Stat. §5831-4 to include a trustee) within the meaning of Rem. Rev. Stat. §§5831-4 and 5831-6.

2. Appellee was appointed pursuant to said application within the meaning of Rem. Rev. Stat. §5831-4.

3. Rem. Rev. Stat. 5831-5 upon which appellant relies is not applicable to this action for the following reasons:

(a) By reason of the clause therein—"If not otherwise limited by law",

(b) By reason of the clause therein—"actions in the courts of this state",

(c) By reason of §11(e) of the Bankruptcy Act (11 U.S.CA.. §29 e) which in any event supersedes Rem. Rev. Stat. §5831-5 so far as this action is concerned.

We respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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DEWITT WILLIAMS,
Attorneys for Appellee.

APPENDIX

Rem. Rev. Stat.* §*5831-4 and* §*5831-6:

SECTION 5831-4. — Preferences by insolvent corporations. — Definitions. Words and terms used in this act shall be defined as follows: (a) "Receiver" means any receiver, trustee, common law assignee, or other liquidating officer of an insolvent corporation. (b) "Date of application" means the date of filing with the Clerk of the Court of the petition or other application for the appointment of a receiver, pursuant to which application such appointment is made; or in case the appointment of a receiver is lawfully made without court proceedings, then it means the date on which the receiver is designated, elected or otherwise authorized to act as such. (c) "Preference" means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such corporation, the effect of the enforcement of which judgment or transfer at the time it was procured, suffered, or made, would be to enable any one of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class (L. '41, ch. 103, §1).

SECTION 5831-6—Preference voidable when—Trust fund doctrine superseded. Any preference made or suffered within four (4) months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four (4) months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded (L. '41, ch. 103, §3).

Rem. Rev. Stat. §5831-5:

SECTION 5831-5.—Action to recover—Limitation. If not otherwise limited by law, actions in the courts of this state by a receiver to recover preferences may be commenced at any time within but not after six (6) months, from the date of application for the appointment of such receiver (L. '41, ch. 103, §2).

Washington Preference Statute prior to Rem. Rev. Stat. §§5831-4-6 (Laws of 1931, ch. 47, §§1 and 2a and b). Repealed by Laws of 1941, ch. 103, §8:

SECTION 1. Actions in the courts of this state by a trustee, receiver or other liquidating officer of an insolvent corporation, to recover a preference as herein defined may be commenced at any time within six months from the time of the filing of the application for the appointment of such trustee, receiver or other liquidating officer.

SECTION 2. a. A corporation shall be deemed to have given a preference if, being insolvent, it has, within four months before the filing of an application for the appointment of a trustee, receiver, or other liquidating officer of such corporation, procured or suffered a judgment to be entered against itself in favor of any person, or made a transfer of any of its property, and the effect of the enforcement of such judgment or transfer will be to enable any one of the creditors of said insolvent corporation to obtain a greater percentage of his debt than any other of such creditors of the same class.

b. If a corporation shall have procured or suffered a judgment to be entered against it in favor of any person or has made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, the corporation be insolvent and the judgment and transfer then operate as a preference,

and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment of transfer would effect a preference, it shall be voidable by the trustee, receiver, or other liquidating officer of said insolvent corporation, and he may recover the property or its value from such person.

Section 11(d) of the Bankruptcy Act of July 1, 1898, 30 Stat. 549, 11 U.S.C.G. §29(d). Superseded by §11e of the Bankruptcy Act quoted on page 41 of this brief):

"d. Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed."